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Better Sit Down For This: Court Clarifies "Suitable Seating" Rules

By Michael Afar and Jeffrey Berman

Seyfarth Synopsis in a Second: Suitable seating is required in California where tasks performed at a particular location reasonably permit sitting, and where providing a seat would not interfere with the performance of standing tasks.

Section 14(A) of California IWC Wage Orders 4-2001 and 7-2001 requires employers to provide "suitable seats" for employees when the "nature of the work reasonably permits the use of seats." In the consolidated decision concerning *Kilby v. CVS Pharmacy, Inc.*, and *Henderson v. JPMorgan Chase Bank*, the California Supreme Court, on April 4, 2016, clarified the "suitable seating" requirements: (1) The "nature of the work" refers to tasks performed at a given location for which a right to a suitable seat is claimed, rather than a "holistic" consideration of all an employee's duties during a complete shift, and rather than a narrow consideration of a particular work task. (2) Whether the nature of the work "reasonably permits" sitting is determined objectively based on all the circumstances, including an employer's business judgment and the physical layout of the workplace. (3) If an employer argues there is no suitable seat available, then the burden is on the employer to prove unavailability.

The Facts

Nykeya Kilby worked for CVS Pharmacy, Inc. as a Clerk/Cashier. She spent 90% of her time at the cash register. The rest of the time she moved around the store, gathering shopping carts and restocking display cases. CVS did not provide seats to Clerk/Cashiers because, in CVS's judgment, standing at the cash register promotes excellent customer service.

Kemah Henderson was a teller at JPMorgan Chase Bank. Although the tellers spent most of their time at their teller windows, they also escorted customers to safety deposit boxes, worked the drive-up teller window, and checked to ensure that ATMs were working properly. JPMorgan did not provide tellers with seats.

Trial and Appellate Court Decisions

Kilby and Henderson pursued class actions in federal district court—for CVS cashiers and JPMorgan tellers respectively—alleging a violation of section 14(A). The district court found that the "'nature of the work' performed by an employee must be considered in light of that individual's entire range of assigned duties" and that "courts should consider an employer's 'business judgment' when attempting to discern the nature of an employee's work." Under this interpretation of section 14(A), the district court denied class certification in both cases and granted summary judgment to CVS.

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On appeal, the Ninth Circuit highlighted the "lack of any controlling California precedent" on section 14(A), as well as the lack of definitions for "nature of the work," "reasonably permits," or "suitable seats." Because of the "ambiguity of [section 14(A)] and the consequences of its meaning to the citizens of California," the Ninth Circuit referred interpretation of section 14(A) to the California Supreme Court," which determined that certification of questions was warranted.

The California Supreme Court Decision

Nature of the work. The Supreme Court held that courts must examine subsets of an employee's total tasks and duties by location, and consider "whether it is feasible for an employee to perform each set of location-specific tasks while seated." Courts should look to the "actual tasks performed, or reasonably expected to be performed," rather than "abstract characterizations, job titles, or descriptions that may or may not reflect the actual work performed." The Supreme Court thus rejected the employers' broad "all-or-nothing approach," concluding that that approach "ignores the duration of those tasks, as well as where, and how often, they are performed," and calling that approach "inconsistent with the purpose of the seating requirement." The Supreme Court also rejected the employees' proposed "single task" approach, because the approach of evaluating whether "a single task may feasibly be performed seated" was "too narrow."

Reasonably permits. The Supreme Court held that a "totality of the circumstances" standard applies. The analysis should include an "examination of relevant tasks, grouped by location, and whether the tasks can be performed while seated or require standing." The Supreme Court also held that the "totality of the circumstances" standard required an analysis of the "feasibility" of providing seats, including "whether providing a seat would unduly interfere with other standing tasks, whether the frequency of transition from sitting to standing may interfere with the work, or whether seated work would impact the quality and effectiveness of overall job performance."

The Supreme Court held that an employer's business judgment and the "physical layout" of a workplace are also relevant in the totality of the circumstances inquiry. The Supreme Court cautioned that "business judgment" does not encompass an employer's "mere preference" that particular tasks can be performed while standing. Rather, the "business judgment" standard must be viewed objectively and can account for an employer's reasonable expectations regarding customer service and the employer's role in setting job duties.

The Supreme Court also cautioned that an employer may not "unreasonably design a workspace" to deny a seat that might otherwise be reasonably suited for the contemplated tasks. The Supreme Court rejected as a factor any "physical differences between employees," explaining that the "suitable seating" provisions analyze when the nature of the *work* reasonably permits a seat, not when the nature of the *worker* does. The Supreme Court expressly did not consider a situation where a worker might be entitled to a sitting-related reasonable accommodation because of a disability.

Suitable seats. The Supreme Court rejected the employer argument that a plaintiff must prove what would constitute "suitable seats," holding that "an employer seeking to be excused from the requirement bears the burden of showing compliance is infeasible because no suitable seating exists."

What *Kilby/Henderson* Means for Employers

While *Kilby/Henderson* provides some clarification of the "suitable seating" rules for employers, the case will be touted by the plaintiffs' bar as a win for employees, as the inquiry will now focus on each particular location where an employee works, as opposed to analyzing holistically the employee's entire set of job tasks. Employers now must review their seating practices for tasks at different "particular locations." And while the California Supreme Court validated the employer's position that "business judgment" and store layouts must be considered, those factors are merely relevant and not dispositive. Finally, it is the employer, not the employee, who will bear the burden of proof with respect to whether suitable seating is available.

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In the end, this case may be representative of the old adage, “Be careful of what you ask for.” Although the Supreme Court may have affirmed the viability of a cause of action for suitable seating, it also may have held that the required location-specific analysis in seating is so individualized that class actions across classifications and locations are no longer “suitable.”

If you would like further information, please contact your Seyfarth attorney, Michael Afar at mafar@seyfarth.com, or Jeffrey Berman at jberman@seyfarth.com.

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